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**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION**

IN RE CAPACITORS ANTITRUST LITIGATION

ALL INDIRECT PURCHASER ACTIONS

Case No. 3:14-cv-03264-JD

**DEFENDANTS' SUPPLEMENTAL BRIEF
IN SUPPORT OF PHASE I BRIEFING OF
DEFENDANTS' MOTION FOR PARTIAL
SUMMARY JUDGMENT DISMISSING
PLAINTIFFS' INDIRECT PURCHASER
CLAIMS BASED ON FOREIGN SALES**

Date: January 19, 2017
Time: 10:00 a.m.
Judge: Honorable James Donato
Courtroom 11 – 19th Floor

INTRODUCTION

The Court has held that the Foreign Trade Antitrust Improvements Act (“FTAIA”) sets the outer bounds of the reach of all state competition laws. *See Order re Phase I of Summary Judgment on Foreign Transactions*, ECF No. 1302 (the “Phase I Order”), at 12-13. State competition laws, therefore, can only apply to claims stemming from alleged anticompetitive conduct outside the United States relating to foreign commerce in very limited circumstances, referred to by this Court as the “eye of th[e] needle” through which the FTAIA allows such claims. Two of the states at issue in the Indirect Purchaser Plaintiffs’ (“IPPs”) case, however, are even more limited in their reach. As the Court recognized, states may circumscribe the reach of their competition laws even further, for example by covering only anticompetitive conduct that occurs within such states’ borders. New York and Florida have enacted such a limitation.

The highest appellate court of New York, the Court of Appeals, has held that the Donnelly Act, the state’s antitrust law, only gives rise to a claim where there is “a very close nexus” between Defendants’ conduct and harm to competition in the state of New York. The Donnelly Act, accordingly, does not apply unless Defendants’ allegedly unlawful conduct had a “particular New York orientation”—and conduct that may have affected commerce nationwide or worldwide is insufficient to meet this requirement. As to the state’s consumer protection statute, New York’s high court has similarly held that conduct by Defendants that deceived a consumer must have occurred “within New York” to be actionable under the statute. The same is true under the Florida consumer protection statute—the only Florida claim IPPs assert. Only deceptive or unfair conduct that occurred within the territorial borders of Florida is actionable under the Florida Deceptive and Unfair Trade Practices Act (“FDUTPA”).

23 Applying the applicable state laws, whether viewed under the FTAIA or the even more
24 narrow geographic limitations of New York and Florida law, Defendants will move to establish that
25 the claims at issue in Defendants' summary judgment motion¹—IPPs' claims based on capacitors

²⁶ See Defendants' Joint Motion for Partial Summary Judgment Dismissing Plaintiffs' Indirect Purchaser Claims Based On Foreign Sales or, in the Alternative, To Simplify the Issues Under Fed. R. Civ. P. 16, ECF No. 911 (the "Motion" or "Mot."), and Defendants' Reply Memorandum in

1 sold by Defendants overseas to third-party distributors, which the distributors then sold to IPPs
2 within the United States—are ripe for dismissal from this case. Claims based on anticompetitive
3 conduct allegedly directed at such overseas sales simply cannot satisfy either the FTAIA or the more
4 stringent rules that apply to claims under New York and Florida law, even if there was a “pass
5 through” effect on sales in the various states.

6 **I. Defendants’ Summary Judgment Motion Against The IPPs’ Claims Based On Foreign**
7 **Sales Under The FTAIA Is Ripe For Decision Unless IPPs Come Forward With**
Evidence To Satisfy An Exception To The FTAIA

8 “The IPPs are individuals and companies who purchased stand-alone capacitors from
9 distributors, who in turn purchased those capacitors from defendants.” Phase I Order at 3.
10 Defendants’ motion for summary judgment was directed at the subset of IPPs’ claims that “involve
11 standalone capacitors first sold outside the United States to a third-party distributor that is not an
12 alleged conspirator.” *Id.* at 12 (quoting Mot. at 5).

13 The Court has now held that the FTAIA sets the outer boundary of the reach of all of the state
14 laws at issue in the IPP action. *See id.* at 13. As Defendants established in their summary judgment
15 papers, the FTAIA bars IPPs’ state law claims based on the challenged sales because (1) they are not
16 import commerce as the capacitors were not imported into the United States by a Defendant or
17 alleged co-conspirator (Mot. at 12-13; Reply at 12-13; *see also* Phase I Order at 5-7); (2) no
18 domestic effect of Defendants’ alleged conduct could have proximately caused antitrust injury to the
19 third-party distributors abroad that purchased the capacitors from Defendants outside the United
20 States, which the distributors then sold to IPPs in the United States (Mot. at 13-15; Reply at 9-12);
21 and (3) IPPs cannot meet the “direct” effect requirement of the FTAIA because by the very nature of
22 the transactions, any domestic effects of Defendants’ conduct did not follow as an immediate
23 consequence of the alleged overseas price-fixing conduct (Mot. at 15-16).

24 The Court has not yet ruled on any of Defendants’ arguments as to how the FTAIA applies to
25 the undisputed facts of the IPP case. *See* Phase I Order at 12-14. Defendants will show that it is
26 now ripe to do so. Specifically, based on the undisputed facts concerning the transactions at issue, as

27 Support of the Motion, ECF No. 987 (the “Reply”).
28

1 admitted by IPPs in their interrogatory responses cited in Defendants' moving papers, it is clear that
2 such claims do not satisfy even the requirements of the FTAIA, let alone the more narrow confines
3 of New York and Florida law. *See* Mot. at 12-16 (citing IPPs' responses to Defendants'
4 interrogatories). Because of the undisputed nature of the IPP claims at issue—Involving allegedly
5 anticompetitive conduct directed at overseas sales to third-party distributors that then resold the
6 capacitors in the United States—Defendants' position in the Motion was that there is no need for
7 further factual development in connection with the IPPs' claims prior to the Court rendering
8 summary judgment. *Cf.* Phase I Order at 10-11 (concerning further factual development necessary in
9 DPP case). Nonetheless, the Court's discussion of the FTAIA in the context of DPPs' claims
10 suggests that additional factual submissions may be required to resolve the issue of whether "the
11 U.S. effects of the [Defendants'] conduct—i.e., increased prices in the United States—proximately
12 caused the foreign" injuries to the third-party distributors that IPPs claim purchased capacitors
13 overseas for resale in the United States. *See id.* at 10 (quoting *Empagran S.A. v. F. Hoffman-*
14 *LaRoche Ltd.*, 417 F.3d 1267, 1271 (D.C. Cir. 2005)). As such, Defendants have requested that IPPs
15 supplement their interrogatory responses to provide the facts that purportedly support their
16 contention that such sales meet the requirements of the FTAIA—*i.e.*, to come forward with
17 significant probative evidence that there is even a genuine issue of material fact that they can thread
18 "the eye of that needle" and show that the sales at issue meet the "gives rise to" and "direct" tests of
19 the FTAIA. *See id.* at 10-11. Defendants will file a Phase II summary judgment motion directed at
20 that issue after IPPs have had the opportunity to identify any such facts.

21 Further, as discussed below, Defendants submit that, regardless of the FTAIA, both New
22 York and Florida have "limited the scope of [their] competition laws to conduct occurring wholly . . .
23 within [their] borders . . ." *See* Phase I Order at 13. The result is that the Court should rule now
24 that IPPs cannot state any claims under New York or Florida laws relating to capacitors that were
25 first sold to third-party distributors overseas, before they were resold in those two states.
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1 **II. Based On The Undisputed Facts, IPPs Have No Viable Claim Under The New York**
2 **Antitrust Statute Or Consumer Protection Statute**

3 **A. The New York Donnelly Act Does Not Apply To Defendants' Overseas Sales To**
4 **Third-Party Distributors Because Defendants' Conduct Did Not Have A**
5 **"Particular New York Orientation" With Respect To Such Sales**

6 As this Court observed, the highest court in New York has held that the Donnelly Act, New
7 York's antitrust statute, has a more limited reach than the Sherman Act. *See Phase I Order* at 13.
8 Indeed, "[t]he established presumption is . . . against the extraterritorial operation of New York law .
9 . . ." *Global Reinsurance Corp. – U.S. Branch v. Equitas Ltd.*, 18 N.Y.3d 722, 735 (2012) (citing 1
N.Y. Statutes § 149). Thus, to give rise to a Donnelly Act claim, there must be "a very close nexus
between the conspiracy and injury to competition in th[e] state" of New York. *Id.* at 736.

10 Although there is little authority examining the outer bounds of this "very close nexus," the
11 facts of *Global Reinsurance Corp.* itself and the New York Court of Appeals' analysis apply directly
12 to the transactions at issue in Defendants' summary judgment motion against IPPs' claims based on
13 capacitors first sold to third-party distributors outside the United States. Under the New York high
14 court's analysis of the Donnelly Act, the IPP claims at issue are not sustainable as a matter of law.

15 In *Global Reinsurance Corp.*, the product at issue was an insurance product called
16 "retrocessional coverage." *See id.* at 734. An alleged antitrust violation purportedly caused the
17 plaintiff to suffer "economic injury when retrocessional claims management services were by
18 agreement within th[e] London marketplace consolidated so as to eliminate competition over their
19 delivery." *Id.* The "competing insurance syndicates" that participated in that marketplace were
20 collectively "the single most significant seller" of that type of insurance product "worldwide." *Id.* at
21 726, 729 n.5.

22 As to the purchase that actually caused its injury, the plaintiff alleged that "its New York
23 branch purchased retrocessional coverage" from the seller abroad. *Id.* at 734. Thus, the plaintiff was
24 a ***direct purchaser*** that was "injur[ed] here," in New York, because the purchasing branch was
25 "situated here" in New York. *Id.* Nonetheless, the New York Court of Appeals rejected the
26 plaintiff's Donnelly Act claim because the "transaction" allegedly causing antitrust injury "ha[d] no
27 particular New York orientation" and thus was "not redressable under New York State's antitrust

1 statute.” *Id.*

2 The exact same conclusion applies to the claims at issue here. A conspiracy directed at
3 foreign purchasers of capacitors, even if later resold in New York, would not have any “particular
4 New York orientation,” *see id.*, and no such New York orientation is even alleged. Indeed, the
5 plaintiff in *Global Reinsurance Corp.* was a direct purchaser in New York that made its purchase
6 from the defendants outside the United States—a fact pattern that this Court has stated would be
7 considered import commerce and thus not excluded by the FTAIA. *See* Phase I Order at 5-7
8 (capacitors invoiced to entities in the United States or delivered to entities in the United States are
9 import commerce). Despite these facts, the New York Court of Appeals held that the plaintiff did
10 not have claims under the Donnelly Act due to the lack of any sufficient New York orientation.²
11 Given this ruling by the highest state court in New York, it follows *a fortiori* that an indirect
12 purchaser in New York of a capacitor first allegedly sold to a distributor overseas at an
13 anticompetitive price would not have a Donnelly Act claim, because there would be no “particular
14 New York orientation” to the allegedly anticompetitive conduct that impacted the overseas sales.
15 *See Global Reinsurance Corp.*, 18 N.Y.3d at 734; *see also People ex rel. Cuomo v. Coventry First*
16 *LLC*, 861 N.Y.S.2d 9, 10 (2008) (“The Donnelly Act claim was properly dismissed to the extent that

17 ***the alleged conduct did not take place ‘in this state’***”) (quoting Donnelly Act, N.Y. Gen. Bus. Law
18 § 340) (emphasis added); *In re Cast Iron Soil Pipe & Fittings Antitrust Litig.*, No. 1:14-md-2508,
19 2015 WL 5166014, at *26 (E.D. Tenn. June 24, 2015) (dismissing Donnelly Act claim for failure to
20 allege any “connection between [New York] state and the wrongful conduct”).

21 **B. IPPs’ Claims Under The New York Consumer Protection Statute Are Not Viable**
22 **As A Matter Of Law Because Defendants’ Conduct With Respect To The**
23 **Challenged Sales Occurred Entirely Outside The United States**

24 Similar to the territorial limits on the application of the Donnelly Act, the New York high

25 ² Although the New York Court of Appeals initially examined the claimed conspiracy under the
26 framework of the FTAIA, it made clear that it did “not ultimately ground [its] determination that the
27 Donnelly Act does not reach the presently claimed conspiracy upon the FTAIA,” and “[e]ven if the
Sherman Act could reach the purported conspiracy,” it would still not be actionable under the
Donnelly Act. *Global Reinsurance Corp.*, 18 N.Y.3d at 736 (emphasis added).

court has also warned against the “unwarranted expansive reading” of the New York consumer protection statute “potentially leading to the nationwide, if not global application of General Business Law § 349” *Goshen v. Mut. Life Ins. Co. of N.Y.*, 98 N.Y.2d 314, 325 (2002). Instead, to establish liability for a claim under the consumer protection statute, IPPs must prove that Defendants made an “actual misrepresentation or omission to a consumer,” and, crucially, “to qualify as a prohibited act under the statute, the deception of a consumer ***must occur in New York.***” *Id.* (emphasis added). Based upon the undisputed facts regarding the category of commerce at issue, it is impossible for IPPs to meet this burden as there is not even any factual allegations of a deception by any of the Defendants in New York with respect to such sales.

Putting aside that IPPs have failed to allege or adduce evidence of any unlawful conduct by Defendants within New York, let alone deceptive conduct directed ***at consumers*** in the state as New York law requires,³ with respect to the specific transactions challenged in the Defendants’ summary judgment motion, Defendants ***could not*** have made any misrepresentation or omission ***in New York*** to any consumer, because the only sales at issue in the Motion were made by Defendants to third-party distributors ***outside the United States***, which then resold those products to customers in states like New York. Thus, there can be no genuine issue of material fact as to whether any defendant engaged in any “deception of a consumer [which] ***must occur in New York***” as to sales that were first made by Defendants to distributors outside New York. *See Goshen*, 98 N.Y.2d at 325 (emphasis added). Indeed, by definition, Defendants’ only conduct with respect to such sales occurred outside New York. For this reason, the Court should enter summary judgment against IPPs’ claims under New York’s consumer protection statute arising from the sales at issue in the Motion. *See id.; People ex rel. Spitzer v. Direct Revenue, LLC*, 862 N.Y.S.2d 816, 2008 WL

³ Even if there were evidence of deceptive conduct directed at the distributor direct purchasers of capacitors from which IPPs allege they made their purchases, such conduct would not be sufficient to maintain a claim under the New York consumer protection statute. *See In re Auto. Refinishing Paint Antitrust Litig.*, 515 F. Supp. 2d 544, 552-53 (E.D. Pa. 2007) (“New York courts . . . have consistently held that when the conduct at issue is between two companies and does not involve the ultimate consumer, it cannot be the basis of a claim under §349 . . . even when the result of the deception impacts on a consumer[.]”).

1 1849855, at *7 (N.Y. Sup. Ct. March 12, 2008) (holding that § 349 claim was “jurisdictionally
2 defective” where “Petitioner nowhere alleges that respondent completed, in whole or in part, any
3 wrongful act . . . within the state” and that allegations of deception that “affected consumers
4 nationwide” were not enough).

5 **III. IPPs’ Claims Under The Florida Consumer Protection Statute Are Not Viable As A**
6 **Matter Of Law Because Defendants’ Conduct With Respect To The Challenged Sales**
Occurred Entirely Outside The United States

7 Florida also has a strong presumption against the extraterritorial application of its laws.
8 “Florida law cannot be applied extraterritorially unless the statute contains an ‘express intention that
9 its provisions are to be given extraterritorial effect.’” *Howard v. Kerzner Int’l Ltd.*, No. 12-22184-
10 CIV, 2014 WL 714787, at *5 (S.D. Fla. Feb. 24, 2014) (quoting *Burns v. Rozen*, 201 So.2d 629, 630
11 (Fla. Dist. Ct. App. 1967); citing *Se. Fisheries Ass’n, Inc. v. Dep’t of Nat. Res.*, 453 So.2d 1351,
12 1355 (Fla. 1984)).

13 This limiting principle against extraterritorial claims applies with full force to IPPs’ claims
14 under FDUTPA, Fla. Stat. §§ 501.201, *et seq.*⁴—“FDUTPA applies only to actions that occurred
15 ***within the state of Florida.***” *Five for Entm’t S.A. v. Rodriguez*, 877 F. Supp. 2d 1321, 1330-31
16 (S.D. Fla. 2012) (citing *Millenium Commc’ns & Fulfillment, Inc., v. Office of the Att’y Gen.*, 761
17 So.2d 1256, 1262 (Fla. Dist. Ct. App. 2000)) (emphasis added).

18 A FDUTPA claim has three elements: “(1) a deceptive act or unfair practice; (2) causation;
19 and (3) actual damages.” *Rollins, Inc. v. Butland*, 951 So. 2d 860, 869 (Fla. Dist. Ct. App. 2006). It
20 is the first element—the location of defendants’ alleged ***conduct***—that determines whether a
21 FDUTPA claim is within the territorial reach of the statute. See *Five for Entm’t*, 877 F. Supp. 2d at
22 1331 (dismissing FDUTPA claim where the plaintiff did not “specify the location of the conduct to
23 make certain it occurred within the territorial boundaries of Florida”); *Friedman v. Dollar Thrifty*
24 *Auto. Grp., Inc.*, No. 12-cv-02432-WYD-KMT, 2013 WL 5448078, at *6 (D. Colo. Sept. 27, 2013)
25 (FDUTPA does not apply “where no wrongful conduct was alleged to have occurred in Florida”); cf.
26 *Millenium Commc’ns*, 761 So.2d at 1262 (FDUTPA claim not barred where “the offending conduct

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28 ⁴ IPPs’ only Florida claims are under FDUTPA.

1 occurred entirely within this state” even though the persons “affected by the conduct” were outside
2 of Florida).

3 As discussed *supra* in connection with IPPs’ claim under the New York consumer protection
4 statute, with respect to the specific transactions challenged in Defendants’ summary judgment
5 motion, Defendants *could not* have engaged in any deceptive or unfair conduct *in Florida* that
6 caused IPPs to have suffered damages because the only sales at issue in the Motion were made by
7 Defendants to third-party distributors *outside the United States*. Thus, there can be no genuine issue
8 of material fact as to whether any defendant engaged in any deceptive or unfair conduct “within the
9 territorial boundaries of Florida” with respect to such sales. *See Five for Entm’t*, 877 F. Supp. 2d at
10 1331. Indeed, IPPs plead no allegations about deceptive or unlawful conduct by any Defendants in
11 Florida. For this reason, the Court should grant Defendants summary judgment against IPPs’ claims
12 under FDUTPA arising from the sales at issue in the Motion. *See id.*; *Nieman v. Dryclean U.S.A.*
13 *Franchise Co.*, 178 F.3d 1126, 1128-29 nn. 3 & 4 (11th Cir. 1999) (holding that FDUTPA does not
14 apply extraterritorially and rejecting claim based on conduct of defendant outside the United States).

15 **CONCLUSION**

16 For all the foregoing reasons, the Court should enter summary judgment against IPPs’ claims
17 under New York and Florida law to extent that such claims are based on capacitors first sold by
18 Defendants to third-party distributors outside the United States.

19 Notably, although Defendants’ Motion was directed only at IPPs’ claims based on sales
20 outside the United States, the territorial restrictions of New York’s Donnelly Act and consumer
21 protection statute, and of Florida’s consumer protection statute, would similarly apply to bar IPPs’
22 claims based on sales by Defendants to third-party distributors anywhere outside of New York or
23 Florida, respectively, even if those initial sales were made elsewhere within the United States. As
24 this issue was not raised in the Motion, Defendants reserve the right to move for summary judgment
25 against such sales on this ground at a later time.

1 DATED: November 4, 2016

Respectfully submitted,

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1 Pursuant to Local Rule 5-1(i)(3), the filer attests that concurrence in the filing of this
2 document has been obtained from each of the above signatories.
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